



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 28, 1998

Ms. Linda Wiegman  
Supervising Attorney  
Texas Department of Health- General Counsel Office  
1100 West 49<sup>th</sup> Street  
Austin, Texas 78756-3199

OR98-2321

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 118441.

The Texas Department of Health (the "department") received a request for information related to AHN Home Care, Inc. ("AHN"), a home and community support services agency licensed by the department. You assert that some of the requested documents are excepted from required public disclosure pursuant to section 552.101 of the Government Code in conjunction with various statutory provisions and common-law privacy.<sup>1</sup>

Section 552.101 of the Government Code excepts from disclosure information that is deemed confidential, including information that is made confidential by statute. You raise section 142.009(d) of the Health and Safety Code regarding several groups of documents submitted for our review. Health and Safety Code section 142.009(c) authorizes the

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<sup>1</sup>The department failed to request an open records decision from this office within ten days of receiving the request for information, a fact that generally results in the presumption that the requested information is presumed public. See Gov't Code 552.302. However, because the privacy rights of third parties and the applicability of a confidentiality provision are implicated, these reasons are compelling and sufficient to overcome that presumption. See *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). Therefore, we will consider your argument that the requested documents are confidential by law. However, because we resolve your request on other grounds, we need not address your arguments regarding the Medical Practices Act, V.T.C.S. art. 4495b.

department to conduct investigations of complaints regarding the provision of home health, hospice, or personal assistance services. Section 142.009(d) provides as follows:


The reports, records, and working papers used or developed in an investigation made under [section 142.009 of the Health and Safety Code] are confidential and may not be released or made public except:

- (1) to a state or federal agency;
- (2) to federal, state, or local law enforcement personnel;
- (3) with the consent of each person identified in the information released;
- (4) in civil or criminal litigation matters or licensing proceedings as otherwise allowed by law or judicial rule; or
- (5) on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency.

We have reviewed the documents for which you assert section 142.009(d) of the Health and Safety Code in conjunction with section 552.101 of the Government Code. We have no reason to believe that any of the exceptions to confidentiality in section 141.009(d) apply in this instance. We therefore conclude that the department must withhold these documents from the requestor.

You also contend that documents outlining AHN's financial statements and budgets are made confidential under section 142.004(d) of the Health and Safety Code. Section 142.004(c) specifies the types of information an applicant for a license to provide home health, hospice, or personal assistance services must provide to the department, including "documentation establishing that, at a minimum, the applicant has sufficient financial resources to provide the services required by this chapter and by the department during the term of the license." See Health & Safety Code § 142.004(c)(1). Section 142.004(d) further provides in pertinent part that "[i]nformation received by the department relating to the . . . financial resources of the applicant is confidential and may not be disclosed to the public." Assuming the financial information you have submitted to us was submitted to the department during the license application process, we agree that these documents are made confidential under section 142.004(d) and therefore must be withheld from the public pursuant to section 552.101 of the Government Code.

Finally, we address the extent to which certain patient lists you submitted to this office are excepted from required public disclosure. Section 552.101 of the Government




Code protects information made confidential by the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.*

One of the lists you submitted to this office individually lists Medicare, Medicaid, and "Pro Bona" patients attended by AHN. The identities of Medicare and Medicaid patients are made confidential by federal law. *See* Open Records Decision No. 487 (1988) (names of Medicare and Medicaid patients must be withheld in accordance with 42 C.F.R. § 401.126). We have marked the information the department must withhold from this list; the remainder of this document must be released. On the other hand, the other patient lists you have submitted to this office do not detail whether the respective patients receive federal assistance, but rather only reveal that the patients were discharged and transferred to another facility. We do not believe that the mere fact that an individual is a patient of a home health agency implicates a statutory or common-law privacy interest in non-disclosure. We therefore conclude that the remaining patient lists must be released in their entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

  
William M. Walker  
Assistant Attorney General  
Open Records Division

WMW/RWP/ch

Ref.: ID# 118441

Enclosures: Submitted documents

cc: Mr. William Brown  
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(w/o enclosures)